

MAINE STATE HARNESS RACING COMMISSION  
MINUTES OF MEETING  
MAY 16, 2016

Conference Room, Gambling Control Board  
Department of Public Safety  
45 Commerce Drive, Augusta, ME

Commission Members Present: William Varney, Chair, Gary Reed, William McFarland and Michael Graham

Commission Member Absent: Alex Willette

Staff Members Present: Ron Guay, AAG, Henry Jennings, Carol Gauthier, Miles Greenleaf, Dennis May and Zachary Matzkin

**1. Call the Meeting to Order and Introductions:** William Varney, Chair

**2. Review and Approval of Written Decisions and Orders**

AAG, Guay gave an overview of the approval of the decision and orders. Commissioner Varney asked for a motion on the matter of Franklin Hiscock. Commissioner Graham made a motion to adopt the decision and order for Franklin Hiscock. Commissioner McFarland seconded. Vote 4-0. Commissioner Varney asked for a motion on the matter of Allison MacDonald. Commissioner Reed made a motion to adopt the decision and order for complaint number 2015 MSHRC 061 for Allison MacDonald. Commissioner McFarland seconded. Vote 4-0.

Commissioner Varney asked for a motion on the matter of Patricia Switzer. Commissioner McFarland made a motion to accept the decision and order complaint number 2015 MSHRC 034 for Patricia Switzer as printed. Commissioner Reed seconded. Vote 4-0.

AAG, Guay stated that in order to do business there has to be a quorum and there are 4 Commissioners here but 2 of the Commissioners were present during the hearing. The rule is for any element of business only those people that have the ability to vote on that matter would vote. This was a case that was heard in February before 2 of the Commissioners that were present out of the current Commissioners. He stated that only Commissioners McFarland and Reed would be voting in this matter. Commissioner McFarland made a motion to approve the decision and order for complaint number 2014 MSHRC 032 as written. Commissioner Reed seconded. Vote 2-0.

**3. Consideration of Pending Motions Relating to the Consolidated Cobalt Case**

Commissioner Varney stated that they would move to the consideration of pending motions relating to the consolidated cobalt case. AAG, Guay stated that this case was heard and decided and a written decision and order was adopted. Under the rules within a ten day time period after a decision is issued, the rules allow for reconsideration by a motion of the decision. Those motions were filed very timely. There are two motions for reconsideration. One by the licensees and one by the State. AAG, Guay circulated to the Commissioners Chapter 21, Section 22. This is what you will consider here today. William Childs, Craig Rancourt, Steven Vafiades and Randy Bickmore were present. AAG, Guay asked if Ms. Switzer was included in the motion. Both attorneys stated that they did include her in the notice of hearing. Attorney Childs stated that Ms. Switzer asked them to speak on her behalf so she waives any right to the notice. AAG, Randlett was present for the Department. Attorney Childs stated that he does have a financial business with Commissioner Varney. AAG, Guay asked if the state wished to be heard on Mr. Varney's qualification based on that disclosure. AAG, Randlett stated no. AAG, Guay asked Commissioner Varney if he felt that would preclude him from whether or not he could be fair and unbiased. Commissioner Varney stated no that would not. AAG, Guay asked Commissioners Varney and Graham if they had any business or personal relationship with any of these individuals that would prevent them from being

fair and unbiased in this matter. Commissioner Graham stated that he doesn't have a personal relationship with them but he would receive part of a purse if Mr. Vafiades horse is set back. AAG, Guay asked Commissioner Varney how he would respond to that. Commissioner Varney stated that he would not feel any differently. Commissioner Graham recused himself. AAG, Guay stated that the attorneys did not raise any objections to the proceedings regarding these motions for reconsideration up to this point. Attorney Rancourt stated that when this decision was made it was based on finding that there was evidence that cobalt enhanced the performance of horses. He went back and read the transcript and reviewed all the expert testimony, and he could not find any evidence that suggested that cobalt enhanced the performance of the race horses here in Maine or anywhere else. Every expert that testified for both parties all said that there isn't any scientific proof that cobalt enhances the performance of race horses. He stated that there was no finding in the record so it must be a mistake. There is nothing in the record that suggest enhancement. He asked that this be treated fairly and the facts be applied to the law and the finding of these 32 counts of a violation be reversed because the necessity of finding that the enhancing agent is simply not in the record; and to make that finding is just patently unfair and wrong. For those reasons he would ask that this petition for reconsideration be granted and this decision be reversed. Attorney Childs stated that cobalt is a natural occurring substance. He stated that this needs to be fixed today. AAG, Guay stated that because there is a split Commission he needs to ask a few questions. He asked the attorneys if any of the Exhibits A-N were not in the record. Attorney Rancourt stated that they were all in the record. AAG, Guay asked if they had any new proposed documents that they would like to submit today. Attorney Childs stated that we are under section 22, paragraph 1. AAG, Guay stated that Commissioners Reed and McFarland would be voting on the motion. He asked Commissioner Varney if he is prepared to decide on the motion. Commissioner Varney stated that he is not. AAG, Randlett stated that he is responding briefly to the motion for consideration. The standard which the licensees are proceeding under is Chapter 21, Section 22. 1 which is whether or not there was an error in the decision and it had to have been intended by the Commission members. These licensees have not met that burden on the basis of reconsideration. He stated that there is sufficient evidence on the record that supports that cobalt is performing enhancing in race horses. There is other circumstantial evidence that you can also take into account. If you look at the horses that were all tested for significant amounts of cobalt with regard to these licensees, and if you look at the exhibit that shows race placements these horses were mostly number 1 and 2. He asked the Commission to deny their motion and uphold the decision and allow to move forward. AAG, Guay asked the Commission if they have any questions. No questions from the Commissioners. Attorney Childs disagreed with the Department's contention that the scheduling order does not control the admission of evidence. He stated that the scheduling order is very important. No expert testified that cobalt affects performance. AAG, Guay stated to the Commissioners what the standard is. "A person aggrieved by a decision of the Commission may petition the Commission once to reconsider that decision. A petition for reconsideration must be made in writing within 10 days after the Commission's decision and may be made for (1) Correction of any part of the decision that the petitioner believes to be in error and not intended-by the Commission." He stated that the motion that Commissioners Reed and McFarland would be voting on is whether or not the Commission wishes to reconsider the decision in the consolidated cobalt case based on an error not intended by the Commission. AAG, Guay asked for a vote. Commissioner Reed and McFarland both voted "no". AAG, Guay stated that the motion fails. He stated that the rule says that you may petition the Commission once, so another reconsideration cannot occur. Would the parties agree that the licensees have 30 days from this point to file their appeal? AAG, Randlett stated that after the motion for reconsideration has been finalized for final agency action so that would be 30 days from today. Attorney Childs stated that he did not agree with that. He wanted to appeal today. AAG, Guay stated that he can appeal today. AAG, Guay stated that he has AAG, Randlett's motion for reconsideration. He asked what would be the consequence if the Commission were to grant the reconsideration. AAG, Randlett stated that the bases for his motion is what evidence and grounds that the Commission would have taken into

consideration for a finding, that cobalt was a prohibited substance and the actual written decision and finding by the Commission focused solely on the performance enhancing aspects of cobalt. He is asking the Commission to consider whether or not there would have been other basis under new rules for determining that cobalt would have been a prohibited substance. If the Commission makes that determination, then they would make a determination whether or not the decision should be amended to include that the effect of that would be once the final decision and order is issued would extend the time for appeal period. AAG, Guay stated in terms of the penalty class it would be irrelevant. AAG, Randlett stated that would be correct. AAG, Guay let AAG, Randlett proceed. AAG, Randlett stated that he is bringing this motion on behalf of the Department pursuant to Chapter 21, Section 22, A-1 which focuses on his position that there was in fact in this circumstance an error or mistake made with respect to the board's determination. It was not intended by the Commission members. It would be the same two Commissioner's that just voted. At the time the Commission was making a determination they were looking at whether or not cobalt meets the definition of a prohibited substance under your rules, you focused solely and exclusively on whether or not it enhances performance which is ok because that would be one way of finding cobalt to be a prohibited substance which you did that is not what he's saying is in error. You could have also considered whether or not cobalt is a prohibited substance if it has the potential or could have seriously impacted the health and well-being of the horses. Look under Chapter 11, Section 4, 2-C, there is language in there that talks about additional performance enhancing that says "stimulate, depress, or affect the circulatory, respiratory, cardiovascular, musculoskeletal, or central nervous system of a horse". His argument during the course of this case was not only does it enhance performance but it is harmful. One of the purposes of your rules is to protect the integrity of harness racing and to make sure there is no one out there enhancing the performance of their horses to gain an unfair advantage of other competitors. Another important aspect of your rules that needs to be taken into account is to safeguard the health of the horse. These bulk administrations of cobalt when you start to give horses these substance to the extent of 500 ppb, 1000 ppb at some point that administration can have serious significant detrimental effects to those horses. This is why there is a mistake. Whether or not that section Chapter 11, Section 4, Subsection 4 applied, but the real question is is cobalt a prohibited substance because not only does that section apply but do other subsections apply. If you look at the record and you find that cobalt could cause a significant detriment to the horse, you might want to amend your decision to include additional findings that cobalt has that effect for that reason as well. AAG, Guay asked AAG, Randlett if his motion is Chapter 21, Section 22, Subsection 1? AAG, Randlett stated yes. Attorney Childs stated that this isn't a new argument. In the written closing arguments, the department wrote page 2 under heading argument "evidence produced on the record in this case is adequate in support of finding that administration of bulk cobalt may have significant harmful effects". The Commission heard it. They considered the evidence and they decided that they weren't going to buy that argument. There hadn't been evidence produced in this case that these horses were administered bulk cobalt that would have had a detrimental impact on their horse. AAG, Guay asked the Commissioners if they had any questions. Commissioner Varney asked if that is not added how does that affect cases that are going to be coming before them. AAG, Randlett stated when you issue these decisions you establish precedence. Like in the Murchison case it was based on a particular principal that is now being carried forward and argued by these licensees. You establish a pattern whereby this is what standard becomes. Even in this case that you didn't find that cobalt had potential to be harmful for horses based on the evidence. His concern is that by the way the decision is written and the way things are structured you are limiting your ability to regulate the horses through what is a prohibited substance. That is the consequence of issuing a decision like this. AAG, Guay stated that the legal standard that the Commission has adopted in Mr. Murchison's case and it has been in the decision and orders that we have approved today carried forward. The legal principal is it effects the performance of a horse not enhances. How do you distinguish that verses harming a horse. AAG, Randlett stated that it simply applies that there is some positive improvement in the horse. AAG, Guay asked if there is evidence in the record that demonstrates a level at which there is a harmful

effect to the horse. Was there a blood concentration that you're asking the Commission in the record that they should have adopted? AAG, Randlett stated no. The definition of prohibited substance is the presence of a substance that is not there at naturally occurring levels. With respect to cobalt because it is a natural substance that can occur through the administration of feeds or other types of supplements, you could have some level of cobalt that could be there without some artificial administration by these trainers. The Commission had to struggle with what is the threshold level that we look at to determine whether or not cobalt is a prohibited substance and the Commission arrived at 50 ppb so anything above that. AAG, Guay asked if it would be a different penalty if it is was harmful. AAG, Randlett stated it might fall under a different penalty standard. He didn't look at that. The Commission never got there. If it's a prohibited substance than it's a prohibited substance. He stated that he didn't think it increases the level for Class I, Class II or Class III. AAG, Guay stated if in fact the Commissioners were to find that there was an error and not considering the harmful effects than he thinks these questions would be at that phase. For the purposes of the two Commissioners, he stated the motion. A vote of yes would be to do an additional proceeding to flush it out this concept of harm and a vote of no is that you don't grant the motion and the decision and order stands as its currently written. The motion will be whether or not to grant the departments motion for reconsideration based on the need to correct a part of the decision that was in error because it was not intended by the Commission. Attorney Childs stated as a threshold matter we now have two Commissioners that are going to vote on behalf of evidence that was introduced when there were four Commissioners sitting at that point in time. He stated that AAG, Randlett is now asking a reconfigured Commission with one new member and two of the remaining members to go back in time with a do over on evidence that was clearly presented and arguments that were clearly made, and there was a choice to be made by the Commission and that Commission did not adopt his contention. Attorney Childs stated that they object to his request. AAG, Guay stated that just the two Commissioners are going to vote. He asked for a vote. Commissioner McFarland voted yes. Commissioner Reed voted no. AAG, Guay stated that the motion failed.

#### **4. Adjudicatory Hearings:**

- a. RE: Steven Vafiades, Complaint Number 2014 MSHRC 0017.** Mr. Vafiades is alleged to have violated MSHRC Rules Chapter 11 Section 8. Mr. Vafiades is trainer of record for the horse "Puzzlement". A blood sample obtained from Puzzlement following the Eighth Race at Scarborough Downs on July 25, 2014 disclosed the presence of Flunixin. This complaint is continued to the next meeting.
- b. RE: Steven Vafiades, Complaint Number 2015 MSHRC 063.** Mr. Vafiades is alleged to have violated MSHRC Rules Chapter 7 and 11. Mr. Vafiades is the trainer of record for the horse "Real Special". A blood sample obtained from Real Special following the Eleventh Race at Bangor Raceway on July 21, 2015 disclosed the presence of Ketoprofen. This complaint is continued to the next meeting.
- c. RE: Steven Vafiades, Complaint Number 2015 MSHRC 065.** Mr. Vafiades is alleged to have violated MSHRC Rules Chapter 7 and 11. Mr. Vafiades is the trainer of record for the horse "Real Special". A blood sample obtained from Real Special following the Ninth Race at Scarborough Downs on July 25, 2015 disclosed the presence of Ketoprofen. This complaint is continued to the next meeting.
- d. RE: Stephen Murchison, Complaint Number 2015 MSHRC 058.** Mr. Murchison is alleged to have violated MSHRC Rules Chapter 7 and 11. Mr. Murchison is the trainer of record for the horse "Big Bad Baylee". A blood sample obtained from Big Bad Baylee following the Ninth Race at Scarborough Downs on May 2, 2015 disclosed the presence of

Cobalt. Mr. Murchison was present and represented himself. AAG, Guay qualified the Commissioners. Mr. Jennings presented the following exhibits. Exhibit 1, Notice of Hearing; Exhibit 2, Trainer's License Application; Exhibit 3, MSHRC Race Program; Exhibit 4, Notice of Positive Test; Exhibit 5, MSHRC Sample Tag; Exhibit 6, Sample Shipment Sheet; Exhibit 7, LGC Lab Certificate of Analysis and Exhibit 8, University of Kentucky diagnostic lab final report. AAG, Guay admitted these 8 exhibits without objection. Mr. Murchison had no exhibits. AAG, Guay asked Mr. Murchison if he stipulates to being the trainer of record for the horse Big Bad Baylee and that the horse raced in the ninth race at Scarborough Downs on May 2, 2015. Mr. Murchison stated yes. AAG, Guay asked Mr. Murchison if he admits that the horse had cobalt in its system. Mr. Murchison stated no. Mr. Jennings stated that exhibits 7 and 8 indicate that cobalt was in the horses system. AAG, Guay gave Zachary Matzkin his oath. Mr. Matzkin stated that exhibit 8 is the report of all the cobalt that were ran for them on that day. Page 2 with a star is 162562 is the number that LGC assigns to this sample. They reference that number to exhibit 7 which is the certificate of analysis. If you look at exhibit 5, it shows the original sample card at the time of collection. Mr. Jennings stated that the exhibits that have been admitted offer evidence that the horse Big Bag Baylee on May 2, 2015 had cobalt in its system at a level of 309 ppb and that level of cobalt constitutes a prohibited substance; therefore, it is a violation of commission rules. He also stated that the Commission can look at the Decision and Order relative to the consolidated cobalt cases. Any level over 50 would constitute a violation of a prohibited substance. AAG, Guay gave Mr. Murchison his oath. Mr. Murchison asked why his cases were not included in the consolidated cobalt cases. Mr. Jennings stated that there were 5 cases scheduled for that meeting on cobalt and 4 of them asked for a continuance because they were represented by attorneys. Mr. Murchison stated that was not the question. Why weren't all three cases put together back then? AAG, Guay stated if your cases had been included in the others, what advantage would you have or not have. Part of what we need to figure out is why if you should have been in there, you weren't. What harm it causes you today. Mr. Murchison stated that he got his paperwork on September 2 saying he was suspended. He was given a year, \$1000 fine and return of the purse. September 2<sup>nd</sup> he started his suspension and then it came back up on July 8<sup>th</sup> there was a reverse to 90 days, \$500 fine and return of the purse. He sat out for six months. He had been waiting for these two. Commissioner Varney asked if these three had been put together not in the consolidation cases what would his penalty have been. Mr. Jennings stated based on the decision and order for the other licensees that the state moved for complete agreement with the penalties that were issued in the consolidated cases. The Department views it critically important to be fair and consistent about how you levy penalties. The state would move it that they come out exactly the same. Commissioner Varney stated his question is what they would have been. Mr. Jennings stated 90 days for a first offense, 180 for a second offense and if there was a third offense that would be a full year with all but 180 days suspended. The total would be 450 days of suspension and the fine would be \$2,250. Commissioner Varney stated that he isn't being penalized by having these brought up separately. Mr. Jennings stated depending on your decision but he has already served 6 months. AAG, Guay stated that he didn't get 90 days, he got a year. In his case he didn't have a defense. When his case came down cobalt was found to be a Class I substance. The first offense was 1 year. After hearing all the testimony in the cobalt cases, the Commission decided that the substance is a Class III and not a I. The Commission said what happened in Mr. Murchison's case was not fair that was their judgment. They reopened the hearing and gave him 90 days as if it was a Class III. Commissioner Varney stated that if the Commission finds you guilty of these two additional violations and they put on the states recommended suspension time, and give you credit for what you already served would that satisfy you. Mr. Murchison asked if that would be from September 2 until right now. AAG, Guay stated that this is unusual but Mr. Murchison raised it so we waived it.

For due process standpoint, he wanted to make that clear for the record. Mr. Murchison stated that the horse Ashley's Cool Gal was tested 20 times and she never went any faster or slower. AAG, Guay asked Mr. Murchison if he waived any objection to bring in 2015 MSHRC 059 into the record. Mr. Murchison stated no. Mr. Jennings stated that they are consolidating the two cases. AAG, Guay stated that they are putting in both cases as one case. The state moves for admission of state's Exhibits 1 through 8 for 2015 MSHRC 059. Mr. Murchison made a motion to consolidate 2015 MSHRC 058 and 059. There was no objection to consolidate the two cases. Mr. Murchison admitted to the violation of trainer responsibility on May 2, 2015 regarding Big Bad Baylee and of the horse Friendship on May 3, 2015, and that the horse Friendship raced during the fifth race at Scarborough Downs on May 3, 2015. He also admitted on both days there was a presence of cobalt. AAG, Guay stated that the motion would be a second and third violation within a year of cobalt for trainer responsibility and that using the minimum penalty guidelines as a result he would have a penalty imposed of 450 days based on the third violation accumulative. Mr. Jennings stated that on the third violation in the consolidated case the minimum penalty was an additional 365 days but the Commission decided to suspension all but 180 but it was less than minimum because they suspended half of that. AAG, Guay asked if that would be the recommendation from the state. Mr. Jennings stated yes for the suspension. AAG, Guay stated that the motion would be 450 days starting on August 26, 2015 for all three violations with an additional fine of \$1,750 to be paid in 5 months and return of purses for Big Bad Baylee and Friendship. Commissioner Graham made a motion as stated by AAG, Guay above. Commissioner Reed seconded. Vote 4-0.

- e. **RE: Stephen Murchison, Complaint Number 2015 MSHRC 059.** Mr. Murchison is alleged to have violated MSHRC Rules Chapter 7 and 11. Mr. Murchison is the trainer of record for the horse "Friendship". A blood sample obtained from Friendship following the Fifth Race at Scarborough Downs on May 3, 2015 disclosed the presence of Cobalt. See Complaint Number 2015 MSHRC 058.
- f. **RE: Stanley Whittemore, Complaint Number 2015 MSHRC 072.** Mr. Whittemore is alleged to have violated MSHRC Rules Chapter 7 and 11. Mr. Whittemore is the trainer of record for the horse "Passion Upperclass". A blood sample obtained from Passion Upperclass following the Second Race at the Skowhegan Fair on August 20, 2015 disclosed the presence of Methocarbamol. Mr. Whittemore was not present. AAG, Guay gave Mr. Greenleaf his oath. He asked Mr. Greenleaf questions. Mr. Greenleaf stated that Mr. Whittemore stated to Mr. Greenleaf that he did not give his horse methocarbamol. AAG, Guay qualified the Commissioners. Mr. Jennings presented the following exhibits. Exhibit 1, Notice of Hearing; Exhibit 2, Notice of Positive Test; Exhibit 3, MSHRC Sample Tag; Exhibit 4, Sample Shipment Sheet; Exhibit 5, LGC Lab Certificate of Analysis; Exhibit 6, 2016 License Application and Exhibit 7, Race Program. AAG, Guay asked what the penalty class would be. Mr. Jennings stated that the recommendation would be \$500 fine with all but \$50 suspended and return of the purse. Commissioner Graham made a motion that they find a violation of the trainer responsibility for Mr. Whittemore. Commissioner McFarland seconded. Vote 4-0. AAG, Guay stated that they need a motion for the penalty. Commissioner Graham made a motion to find Mr. Whittemore \$500 with all but \$50 suspended and return of the purse within 30 days. Commissioner McFarland seconded. Vote 4-0.
- g. **RE: Robert Gray, Complaint Number 2015 MSHRC 075.** Mr. Gray is alleged to have violated MSHRC Rules Chapter 7 and 11. Mr. Gray is the trainer of record for the horse "Nifty Ace". A blood sample obtained from Nifty Ace following the Seventh Race at the Windsor Fair on September 2, 2015 disclosed the presence of Flunixin. Mr. Gray was not

present. AAG, Guay asked questions of Mr. Greenleaf. Mr. Greenleaf stated that there was an email between Mr. Reynolds and Mr. Jennings regarding the hearing for Mr. Gray. Mr. Gray was aware of the hearing today. Mr. Gray stated that it was an oversight on his part. AAG, Guay qualified the Commissioners. Mr. Jennings presented the following exhibits. Exhibit 1, Notice of Hearing; Exhibit 2, 2016 Trainer Application; Exhibit 3, Race Program; Exhibit 4, Notice of Positive Test; Exhibit 5, MSHRC Sample Tag; Exhibit 6, Sample Shipment Sheet; Exhibit 7, LGC Lab Certificate of Analysis and Exhibit 8, Email from Robert Gray. AAG, Guay admitted the eight exhibits without objection. Mr. Jennings stated that Exhibit 7 on the third page indicates that flunixin was found in the blood at 127 ng/ml that would be a violation of Chapter 11 because it exceeds a level at which is allowed in the threshold, and it bumps it into Class C because the level is above the threshold. He would recommend a \$500 fine with all but \$50 suspended and return of the purse. AAG, Guay stated that the Commission needs to deliberate on whether or not there is a violation. Commissioner McFarland made a motion that the state has proved that there is a violation of trainer responsibility. Commissioner Graham seconded. Vote 4-0. AAG, Guay stated that they need a motion on the penalty phase. Commissioner McFarland made a motion that Robert Gray be penalized \$500 fine with all but \$50 suspended and return of the purse within 30 days. Commissioner Reed seconded. Vote 4-0.

**5. Other Business:**

**6. Public Comment**

Ms. Perkins stated that the Maine Harness Racing Promotional Board, the Maine Breeders and the Maine Harness Horsemen's Association are hosting a baseball game at Hadlock Field at 6:00 p.m. This is to promote harness racing in Maine.

Commissioner McFarland stated that there is a concern from the horsemen regarding the return of purses. Mr. Jennings stated that before a person is issued a license they need to return the purse. Commissioner Varney stated that a certified letter is sent to the owner saying that a hearing is scheduled for return of the purse.

Commissioner McFarland stated that some of these violators that are on suspension are currently returning to the racetrack. There aren't any investigators to investigate these matters.

Commissioner Graham asked if that was part of the responsibility of the State Steward. Mr. Jennings stated yes, and that the state stewards need to work with the track judges and track officials to make sure that those that are suspended are not present on the grounds of a licensed association. Commissioner McFarland stated that it was up to the association to have that person removed from the grounds that was in violation. Commissioner Varney stated that the Commission should send a memorandum to all licensed Associations regarding people that are suspended.

Ms. Perkins stated that the Commission must establish the base purse 30 days prior to the first Sire Stakes race. The first stakes race is June 27, 2016. Commissioner McFarland made a motion to waive the 30 day period to establish the Sire Stakes base purse until June 10, 2016. Commissioner Graham seconded. Vote 4-0.

**7. Schedule of Future Meetings**

June 9, 2016

**8. Adjourn**

12:50 p.m.